(H)

CAUSE NO. 89-376

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION

Petitioner

V.

GLORIA TREVINO, ET AL,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF BELL HELICOPTER TEXTRON INC. IN SUPPORT OF PETITION OF GENERAL DYNAMICS CORPORATION FOR A WRIT OF CERTIORARI

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BELL HELICOPTER TEXTRON INC.'S BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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2. Army Regulation 27-40.

3. Dr. Dan Schrage and Mr. Charles C. Crawford, Retired.

4. Letter to Mr. Robert Garfield, Chief, General Law Division, AVSCOM Legal Office, St. Louis, Missouri re: approval for Dan Schrage to become a Bell Helicopter expert witness in the *Beavers v. Bell Helicopter Textron Inc. case.*

5. Letter to Mr. Robert Garfield, Chief, General Law Division, AVSCOM Legal Office, St. Louis, Missouri re: approval for Charles C. Crawford to become a Bell Helicopter expert witness in the *Beavers v. Bell Helicopter Textron Inc. case.*

6. Letter to R. David Broiles from John P. Galligan, Lt. Col., U.S. Army, Chief, General Litigation Branch, Washington, D.C. denying both Dan Schrage and Charles C. Crawford to be used as expert witnesses for Bell Helicopter Textron Inc.

7. Letter to Lt. Col. John P. Galligan, U.S. Army, Chief, General Litigation Branch, Washington, D.C. re: renewal of request to employ Dan Schrage and Charles C. Crawford as expert witnesses for Bell Helicopter Textron Inc.

8. Letter to R. David Broiles from John P. Galligan, Lt. Col., U.S. Army, Chief, General Litigation Branch, Washington, D.C. denying the renewed request for both Dan Schrage and Charles C. Crawford to be used as expert witnesses for Bell Helicopter Textron Inc.

9. Letter of Consent, by Herbert L. Fenster, Counsel for Petitioner General Dynamics Corporation, dated August 30, 1989.

10. Letter of Consent, by David W. Holman, Counsel for Respondent Gloria Trevino, et al, dated September 15, 1989.

CAUSE NO. 89-376

GENERAL DYNAMICS CORPORATION

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Respondents

BELL HELICOPTER TEXTRON INC.'S BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF THIS COURT:

BELL HELICOPTER TEXTRON INC. respectfully submits its BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI and would show the following:

I.

INTEREST OF AMICUS CURIAE

The interest of BELL HELICOPTER TEXTRON INC. is set forth in its foregoing MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI. Permission has been granted by the counsellors in this case in accordance with Supreme Court Rule 36.1 by letters of consent, which are attached hereto and incorporated herein for all purposes as Attachment Nos. 9 and 10.

II.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision in *Trevino v. General Dynamics Corp.*, 825 F.2d 1474 (1989) regarding the proof required for the first element of the military contractor defense as set forth by this Court in *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988) (that the United States approved reasonably precise specifications) is completely at odds with and vitiates the intent and effect of that decision. Operating under the requirements imposed by the Fifth Circuit in this case does not mean merely that stricter demands are made upon a contractor to establish the military contractor defense. As a practical matter it means that there may be no such defense available.

The Fifth Circuit held that government approval of a design for military equipment without proof of substantive review or evaluation by the military of the relevant design feature does not establish the first element of the military contractor defense. But a military contractor may not be able to establish proof of substantial review of a design by the military without involving testimony by military personnel as to their background and the extent of their evaluation and understanding of the relevant design feature, and such testimony by

military personnel may not be available to a contractor.

Further, by requiring the court to determine and judge whether the approval by the government was given after the government had engaged in a substantive review and evaluation of the design feature at issue, the Fifth Circuit's decision requires second-guessing of military decisions by the court.

III.

THE MILITARY REFUSES TO ALLOW ITS PERSONNEL TO TESTIFY REGARDING THE EXTENT OF ITS REVIEW AND UNDERSTANDING OF A DESIGN FEATURE

Bell has had recent experience which shows that not only would the requirement of proof of "**substantive review**" be tantamount to second-guessing of the military's judgment, but it is a burden of proof that the contractor may not be able to meet because the military refuses to allow its personnel and former employees to testify.

The Department of Defense does not want and may not allow its employees to testify in civil cases. The military officers who might provide the testimony required by *Trevino* are prohibited by the Government from testifying with respect to their decisions without government permission.

In a Policy Letter entitled, "Accident AfterMath: What to Do When the lawyer Calls" (Attachment 1), the Judge Advocate of the U.S. Army Safety Center informed acting and retired Army personnel:

> It should be noted that any litigation following a military aviation accident usually involves the service member or his/her survivors filing a lawsuit against the manufacturer of the aircraft or of a component. This is because of the U.S. Supreme Court's ruling in December 2, 1950 in the case of Feres v. U.S.
>
> If you are contacted to give testimony as an expert you should refuse to make any statement except that appropriate clearance must be obtained from the Office of the Judge Advocate General, Headquarters, Department of the Army.
>
> After leaving the military service or federal employment there is generally no restriction on testifying as an expert witness so long as you did not act for the U.S. Government in those matters.

This policy is based on Army Regulation 27-40 (Attachment 2).

In a recent case, *Beavers v. Bell Helicopter Textron Inc.*, Cause No. 68, 282-C, in the 251st Judicial District of Potter County, Texas, involving the failure of a bearing on a Bell AH-1 Cobra gunship helicopter, the plaintiff alleged a design defect in the swashplate assembly. Bell contended that the failure was the result of increased

on the rotor system caused by the Army's use of the helicopter, and certain modifications, and defended on the basis of the military contractor defense.

Shortly after the *Trevino* decision, and because of its language, Bell's attorneys perceived the need to have the testimony of Dr. Dan Schrage, who was a member of the Army Aviation Systems Command Source Selection Committee, and Mr. Charles C. Crawford, former Technical Director of Research, Development, and Engineering for the U.S. Army Aviation System Command (both are now retired, *see*, Attachment 3). These men had been intimately involved in the historical development and participation of the Army in the design and manufacture of the Bell AH-1 Cobra helicopter, and could testify specifically to the requirements of *Trevino* as to "**substantive evaluation**" and "**understanding**" of the Army. The testimony of these retired Army employees would provide the most convincing evidence for the jury to judge whether the Army decision makers understood the issue with regard to the swashplate bearing.

Because of the holding in *Trevino*, Bell requested permission to use the testimony of Dr. Schrage and Mr. Crawford. Following the dictates of Army Regulation 27-40, Bell requested authorization for such testimony from the Chief, General Law Division, AVSCOM Legal Office, by letters dated March 16, 1989 (Attachments 4 and 5). By

reply letter, dated March 30, 1989 (Attachment 6), the Army denied the requests, stating:

> The policy of the Army is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have a significant interest. When a witness with an official connection with the Army testifies, there is a natural tendency to assume that the testimony represents the official views of the Army even where there are express disclaimers to the contrary.
>
> The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. When Army personnel testify as witnesses in such unrelated litigation, their official duty performance is invariably disrupted, often at the expense of the Army's mission accomplishment and the federal taxpayer.
>
> Finally, the Army is concerned about the potential conflict of interest inherent in the unrestricted appearance of its personnel as witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust in the integrity of our Government.

In the event that the Army's denial was based upon a concern that the testimony of Dr. Schrage and Mr. Crawford would be used to establish their opinions as independent experts, Bell renewed its request

(Attachment 7), disclaiming such intention and emphasizing that these persons, by virtue of their direct involvement in the Army's approval of the specifications, understood the implications of the design at issue. Specifically, Bell would use the testimony of these retired Army personnel only to show that the Army was not "**rubber stamping**" a contractor's decision but was exercising a "**discretionary function**".

Nevertheless, the Army again denied Bell's request to depose Dr. Schrage and Mr. Crawford (Attachment 8), and the presentation of the government contractor defense was greatly undermined because key witnesses could not testify.

IV.

EVEN IF MILITARY PERSONNEL WERE PERMITTED TO TESTIFY, SUCH TESTIMONY WOULD INVOLVE THE COURT OR JURY IN A SECOND-GUESSING OF MILITARY PROCUREMENT DECISIONS

It should be appreciated that had the Army permitted Dr. Schrage and Mr. Crawford to testify, the Fifth Circuit's requirements as to "**approval**" would then involve second-guessing by the court or jury of the military's decision. It is illusory to conclude that a defense contractor can establish that there was a "**substantive review and evaluation**" of the design or that the officer

signing the approval "**understood**" the specifications without having the judgment of the armed services put in issue.

The court or jury would be obliged to decide whether Dr. Schrage and Mr. Crawford had engaged in a substantive-enough review of the specifications, whether they "**understood**" the specifications, and whether their decisions were "**informed military decisions**". Plaintiff would, of course, attempt to show that the Army had not engaged in a substantive review of the specifications and that the Army did not really understand the issues of safety presented by the relevant design feature. Plaintiff would attempt to discredit the testimony of Dr. Schrage and Mr. Crawford and might seek military personnel who would disagree with the decisions made. The court or jury would be faced with passing judgment as to the "**informed**" nature of the Army's decision, as to whether the Army had engaged in what Dr. Schrage and Mr. Crawford were to describe as a substantive review, and the result would be that civilians would determine whether the Army sufficiently understood what it was doing when it approved the design of the Bell helicopter. The court or jury would engage in second-guessing of the selection of the appropriate design for military equipment to be used by our Armed Forces, a selection process that this Court has described in *Boyle* as involving "**not merely**

engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness." Whether the jury found that the military "**knowingly**" and "**fully understood**" what it approved, or whether it found to the contrary, the jury would be "**second-guessing**" the military. Either way, military decisions are being reviewed by a court, a task for which the judiciary is ill-equipped and has little competence.

Nowhere in the precise and elaborate analysis by this Court in *Boyle* is there any hint, much less directive, that in order to show "**approval**", the Government must be shown to have engaged in "**substantive review or evaluation.**"

V.

THE TREVINO DECISION INDICATES A MISUNDERSTANDING OF THE PROCEDURE BY WHICH THE GOVERNMENT PROCURES MILITARY EQUIPMENT

The Fifth Circuit's concern that "**if the signature of a government employee on a design drawing in a box marked 'approval' establishes the first element of a military contractor defense as a matter or law, government contractors would make sure that they would**

would never face liability for defective design of military equipment merely by bargaining for a guarantee that some federal employee would place his signature at the bottom of every sheet of paper involved in the design of a product and thus confer the government's approval" reflects a misunderstanding of the process engaged in by the government and the contractor in the purchase of military equipment.

Such a concern, that a contractor might "**bargain**" for a "**mere approval**" signature, is hardly the material of which good policy is formulated. In some 30 years of contracting with the Government for military equipment, Bell Helicopter has never been confronted with such a situation. In *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985), the Fifth Circuit recognized "**. . . military contractors are often unable through negotiation to alter the design specifications of their military products . . . .**" Is there now reason to suggest the military will blindly stamp "**approved**" on anything a contractor submits?

The Fifth Circuit has held that "It would be absurd to fashion a rule . . . disallowing liability . . . when the federal officer signing the design approval did not review or understand the specifications." (Emphasis added.) *Trevino*, at 1481.

These requirements are in direct conflict with the Supreme Court's interdiction of "**second-guessing of the**

military's judgment through state tort suits against contractors [which] would produce the same effect sought to be avoided by the FTCA exception." *Boyle*, at 957. How much must the federal officer know in order to "**know what is there**"? Must one go into his educational background to prove what the federal officer fully understood the issues involved? What is a substantive evaluation and review? What evidence is needed to prove the person who ultimately signed in the approval box was capable of a substantive review and approval?

One can envision trials where experts for the plaintiffs will testify that the design feature complained of is unreasonably dangerous and the person who approved it could not have "**understood**". By definition, if he had understood it he would not have approved it because reasonable people who understand what they are doing do not approve unreasonably dangerous designs.

The Fifth Circuit has misinterpreted the military contractor defense and will cause the trial of and second-guessing of military procurement decisions, thus defeating the import of the holding in *Boyle*. To require proof of "**substantive review and evaluation**" is to invite the very second-guessing through tort suits that this Court, and almost all courts, including the Fifth Circuit, have sought to avoid.

CONCLUSION

Since the Fifth Circuit's decision is clearly not the law as set forth in *Boyle*, this Court should grant the Petition for Certiorari and expressly overrule the *Trevino* rationale.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing BELL HELICOPTER TEXTRON INC.'S BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI has been mailed, on this 27th day of September, 1989, pursuant to the Federal Rules of Civil Procedure to the following:

Mr. John F. Daly
U.S. Department of Justice
Washington, D.C. 20530

Mr. Herbert L. Fenster
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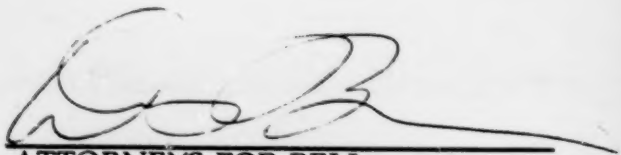
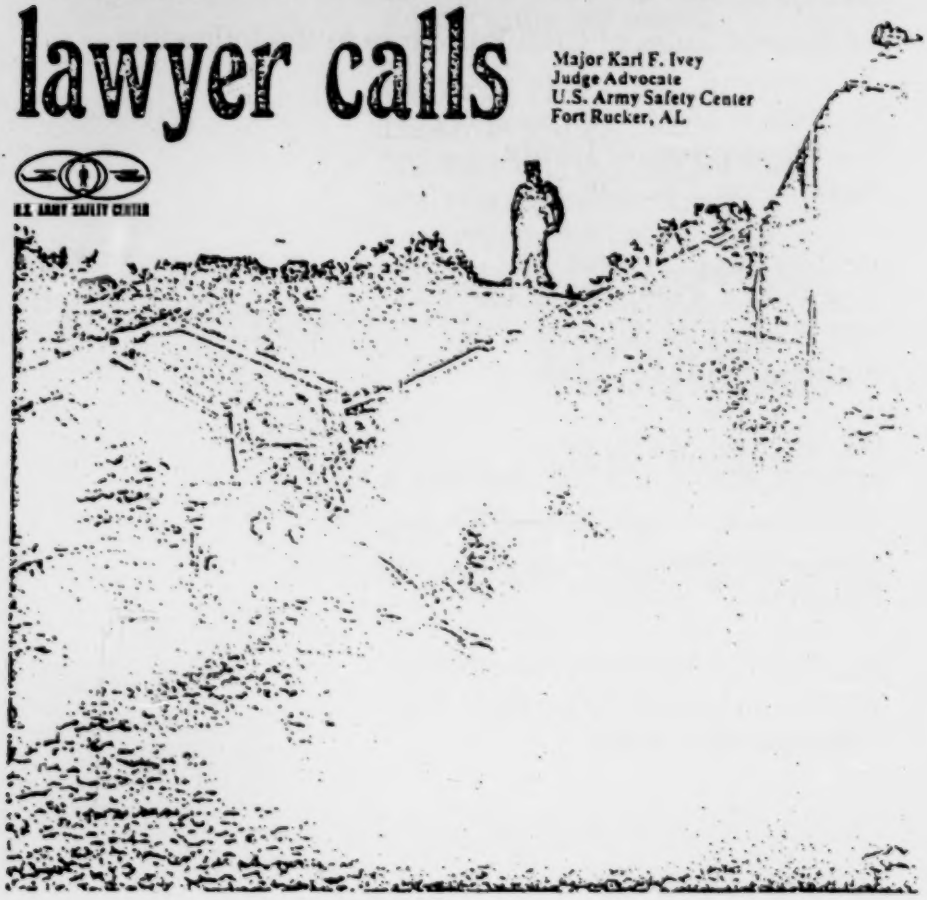


ATTORNEYS FOR BELL
HELICOPTER TEXTRON INC.

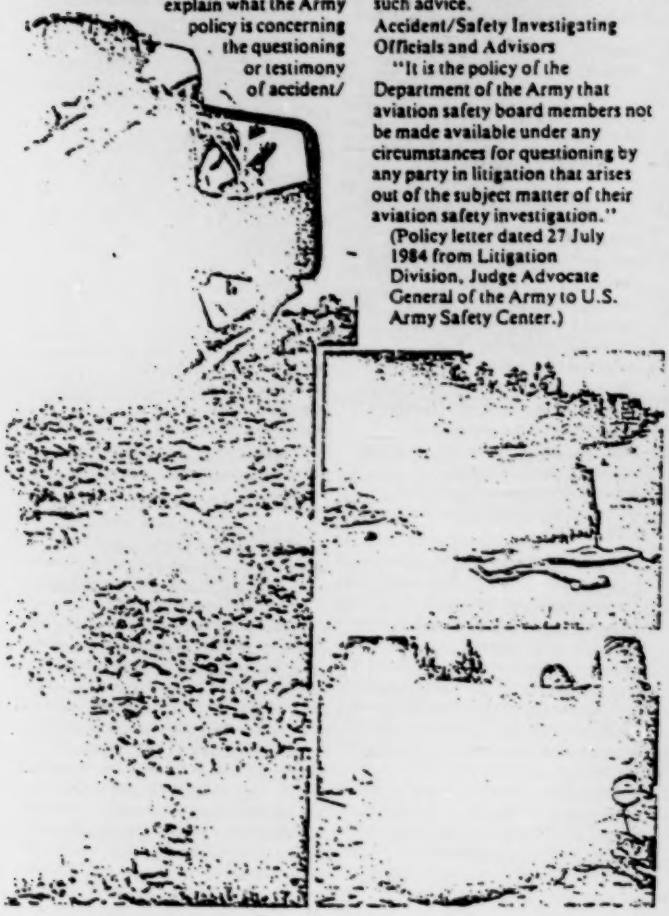
Accident Aftermath: What to do when the lawyer calls

Major Karl F. Ivey
Judge Advocate
U.S. Army Safety Center
Fort Rucker, AL



ATTACHMENT 1

THE INCREASING number of lawsuits related to military aviation mishaps has led to several recent instances where accident/safety investigating officials have been asked to provide statements, depositions and courtroom testimony about their involvement in the accident investigation process and what the investigation revealed. The purpose of this article is to explain what the Army policy is concerning the questioning or testimony of accident/safety investigating officials, "expert" testimony by Army personnel, or testimony of those people who are merely witnesses to events. This article should not be considered as a substitute for specific legal advice on the issues which you, as a prospective witness, must resolve before testifying. You should always consult a judge advocate or Army civilian legal advisor for such advice.



Accident/Safety Investigating Officials and Advisors

"It is the policy of the Department of the Army that aviation safety board members not be made available under any circumstances for questioning by any party in litigation that arises out of the subject matter of their aviation safety investigation."

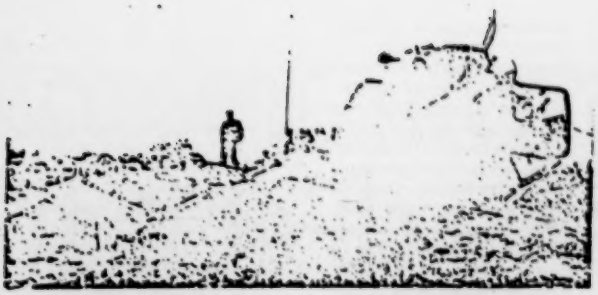
(Policy letter dated 27 July 1984 from Litigation Division, Judge Advocate General of the Army to U.S. Army Safety Center.)

The Army does not permit complete release of any aviation safety investigation reports, which by regulation are privileged "limited use" reports releasable within the Army only for accident prevention purposes (see AR 385-40, paragraph 1-9a). The reason for this strict control on the release of such reports is the Army's critical interest in insulating aviation safety board members from outside pressures that could affect their judgment or cause them to be less than candid in their reports. In addition, some information obtained in this investigative process is obtained only under a promise of confidentiality. If the integrity of the process is to be maintained, that confidentiality cannot be compromised.

For many of the same reasons, the Army cannot allow aviation safety board members to be questioned about their investigations. It would be virtually impossible to preclude inquiry into matters such as statements of opinion, comments, findings of accident causes, recommendations for corrective action and confidential witness statements, all of which would be exempt from release if requested under the Freedom of Information Act. If questioning of aviation safety board members were permitted, we would, in effect, be allowing the requesting parties to obtain information indirectly which they could not obtain directly, contrary to clearly established Army policy and Army regulations which govern the release of such information. (See AR 385-40, paragraph 1-7, and DOD Directive 6055.7.)

This restriction on releasing accident report data is a lifetime restriction. If former investigators are suspected of a breach of privileged data they can be investigated by the Inspector General even though they are no

ATTACHMENT 1



longer in federal employment. (See AR 600-50, chapter 5.) If the Inspector General finds there has been a violation of the Standards of Conduct, the Secretary of the Army can impose sanctions against the violator (such as restriction from entering Army installations or other restrictions). Anyone who profits by such a conflict of interest violation (i.e., is paid expert witness fees for testifying) may have court action taken against them through the Department of Justice by the Department of the Army for forfeiture of their ill-gotten gains.

"The Army does not permit complete release of any aviation safety investigation reports, which by regulation are privileged 'limited use' reports releasable within the Army only for accident prevention purposes."

Since many investigators may be living in, or assigned to, other locations away from the location of the accident when the request for testimony or questioning is first made, it is imperative that they refuse to make any statements without first consulting the nearest Army judge advocate or Army civilian legal advisor. That legal counsel should contact the Judge Advocate of the U.S. Army Safety Center (AV 558-3819/3005 or FTS 533-3819/3005). The Army lawyers will handle the matter for the safety investigator or board member/advisor in accordance with the procedures of AR 27-40.

These requirements do not apply to those people who are appointed to conduct "boards of investigation" or other MACOM or corps-directed safety investigations. Such investigations do not result in "limited use" investigation reports. Aircraft accident investigations and Safety Center ground accident investigations are the most common types of limited use investigation reports. For investigations where "general use" investigation reports are prepared, safety officials or board members should follow the procedures described below in testifying about information concerning the conduct of Army activities and information received pursuant to official duties.

Expert Witnesses for Private Litigation

"It is the policy of the Department of the Army to maintain strict impartiality in private litigation. It is for this reason that AR 27-40, paragraph 7-17, generally prohibits military personnel and civilian employees from appearing as expert witnesses in private litigation. This prohibition is strictly applied in cases where the expert testimony sought involves knowledge and expertise acquired in the performance of duties pursuant to or in support of an official investigation of any type." (Policy letter dated 27 July 1984 from Litigation Division, Judge Advocate General of the Army to U.S. Army Aviation Center.)

"Some information obtained in the investigative process is obtained only under a promise of confidentiality. If the integrity of the process is to be maintained, that confidentiality cannot be compromised."

Private litigation is a court action or lawsuit in which the U.S. Army or the U.S. Government is not a party and has no direct or indirect interest in the outcome of the court case. For the reasons explained in the next paragraph, there is much private litigation following Army fatal and disabling injury mishaps. Since many Army aircraft and much equipment is unique or is not commonly present in the civilian community, it can be expected that attorneys for either side in private litigation will seek out aviators, maintenance personnel, or others in the military services to testify about the equipment involved in an accident or to testify about some technical procedure at issue in the private litigation.

"It is the policy of the Department of the Army to maintain strict impartiality in private litigation."

It should be noted that any litigation following a military aviation accident usually involves the servicemember or his/her survivors filing a lawsuit against the manufacturer of the aircraft or of a component. This is because of the U.S. Supreme Court's ruling in December 1950 in the case of *Feres* v. *U.S.* That decision established that servicemembers or their surviving family members cannot sue the U.S. Government for injuries received or for death of the servicemember which was

ATTACHMENT 1

"...to military service," even though there is clear negligence on the part of some government official or Army member.

If you are contacted to give testimony as an expert you should refuse to make any statement except that appropriate clearance must be obtained from the Office of the Judge Advocate General, Headquarters, Department of the Army. You should refer the request through your supervisors and commander to your installation legal advisor or judge advocate for resolution of the request.

After leaving the military service or federal employment there is generally no restriction on testifying as an expert witness so long as you did not act for the U.S. Government in those matters and you are not using "insider" information. AR 600-50 contains most of the conflict of interest prohibitions and should be consulted prior to your departure from your last position in the military or as an employee of the U.S. Government.

Military Personnel and Civilian Employees Who Witness an Accident or an Event in Litigation

The appearance of military personnel and civilian employees in private litigation, or for questioning or interviewing by a litigant's attorney, is solely a personal matter between the prospective witness and the litigant's attorney who requests them, subject to the approval of the individual's commanding officer or supervisor. (See AR 27-40, paragraph 7-12.) If for personal reasons the military servicemember or civilian employee does not want to be interviewed, or to testify, he or she must be counseled by the installation's judge advocate or legal advisor on the legal consequences of any refusal. The use of a deposition [illegible] testimony not in court but with all litigants' attorneys present) is encouraged since this procedure helps to minimize interference with the witness' performance of duties.

Obviously many people who witness an event have factual information, based on their personal observations, about an accident. Generally there is no restriction against testimony by these witnesses. You may not testify or be interviewed without Department of the Army approval if it appears that (1) the testimony/interview will concern the manner in which Army or unit activities were conducted, or (2) information exempt from release to the public is sought, or (3) information is sought which was acquired in the performance of your official duties. (See AR 27-40, paragraph 7-17c.) In any case, you are never wrong in seeking the advice of your judge advocate or Army civilian legal advisor on the propriety of your testifying or being interviewed by a lawyer concerning an Army accident.

Some Final Considerations

As citizens each of us has a moral obligation and a responsibility to truthfully present facts and come forward with information so that justice can prevail. On the other hand, if for personal reasons you do not want to give testimony in a court case, there may be legal or regulatory authority to support your desire not to testify. Legal counselling can dispel some of the fears that you may have and may indicate to you that in the end you may still be forced to testify by a court order. If you do have to testify there are many circumstances in which you may have an Army legal representative present while you are testifying and you may travel to the trial in a duty status. (See AR 27-40, chapter 7.) After seeking legal advice both you and your superiors will be in a good position to determine if your testimony is warranted.

About the Author

Major Karl F. Ivey graduated from the United States Military Academy at West Point in 1969 with a B.S. degree in engineering. He completed law school at Memphis State University in 1976 and is a member of the Tennessee Bar Association and the Lawyer-Pilot Bar Association.

Major Ivey has served as Judge Advocate of the Army Safety Center since September 1982. His prior assignments included Defense Counsel/Legal Assistance Officer, 1st Armored Division, in Germany; Deputy Judge Advocate at SHAPE, Belgium; and as the Chief Trial Counsel, 101st Airborne Division (Air Assault.)

Prior to attending law school, Major Ivey served in Vietnam with the 173d Airborne Brigade and in CONUS with the 82d Airborne Division. He has been awarded the Ranger Tab, Parachute Badge, and Air Assault Badge.

ATTACHMENT 1

Army Regulation No. 27-40

Legal Services - Litigation

Chapter 7

ATTACHMENT 2

ARMY REGULATION
No. 27–40

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC, 15 June 1973

LEGAL SERVICES

LITIGATION

Effective 1 July 1973

This regulation consolidates and revises AR 27–37, "Claims in Favor of The United States For Damage to or Loss or Destruction of Army Property" (Chap. 5, Section I); AR 27–38, "Claims in Favor of The United States for the Reasonable Value of Medical Care Furnished by The Army" (Chap. 5, Section II); AR 27–40, "Litigation—General Provisions" (Chap. 1–4); AR 27–41, "Avoiding Unnecessary Litigation—Administrative Collection, Compromise, and Referral of Claims in Favor of the Government" (Chap. 5); AR 27–44, "Minor Offenses Committed on Federal Reservations" (Chap. 6); and AR–45, "Release of Information and Appearance of Witnesses" (Chap. 7). Local limited supplementation of this regulation is permitted, but is not required. If supplements are issued, one copy of each will be furnished the Office of The Judge Advocate General, HQDA (DAJA–LT).

* This regulation supersedes AR 27–37, 18 October 1967; AR 27–38, 15 January 1968, including all changes; AR 27–40, 4 April 1972; AR 27–41, 17 May 1972; AR 27–44, 17 April 1969, and AR 27–45, 28 August 1968, including all changes.

ATTACHMENT 2

ATTACHMENT 2

CHAPTER 7

RELEASE OF INFORMATION AND APPEARANCE OF WITNESSES

Section I. GENERAL

7–1. Purpose. This chapter governs the release of *information exempt from release to the public* when this information is sought for use in litigation and the appearance of military personnel and civilian employees of the Army as witnesses before civilian courts and regulatory bodies. It pertains to private litigation as well as to litigation in which the United States has an interest.

7–2. Explanation of terms. *a. Information exempt from release to the public.* Those categories of information delineated or defined by paragraph 10, AR 345–20.

b. Private litigation. Litigation in which the United States is not a party and in the outcome of which it has no interest, either direct or indirect.

c. Litigation in which the United States has an interest.

(1) The United States or one of its agencies or instrumentalities has been or probably will be named as a party; or

(2) The suit is against a military member or civilian employee of the Army or one of its agencies or instrumentalities and arises out of the individual's performance of official duties; or

(3) The suit arises out of an Army contract, subcontract, or purchase order under the terms of which the United States may be required to reimburse the contractor for recoveries, fees, or costs of the litigation; or

(4) The suit involves administrative proceedings before Federal, State, municipal, or foreign tribunals or regulatory bodies that may result in a financial impact upon the Army; or

(5) The suit may affect the operations of the Army or purport to require, limit, or interfere with official action by a military member or civilian employee; or

(6) The United States has a financial interest in the plaintiff's recovery; or

(7) Foreign litigation in which the United States is bound by treaty or agreement to insure attendance of military personnel or civilian employees.

d. Release of information. The disclosure of information from Army records by furnishing copies, extracts, or summaries of such records; by permitting examination of such records; or by permitting interview with or statement by the custodian or other person having knowledge of their content.

e. Subpoena. Includes Subpoena Ad Testificandum and Subpoena Duces Tecum.

7–3. Related regulations. The basic policies for release of information are in AR 345–20. Other regulations restrict the release of specific types of information and are applicable when consistent with this regulation and AR 345–20. Special note should be made of the regulations listed in appendix J.

7–4. Reference to The Judge Advocate General. *a.* Requests and subpoenas for *information exempt from release to the public* when this information is sought for use in litigation or for the appearance of witnesses which require approval by the Department of the Army will be submitted to HQDA (DAJA–LT) WASH DC 20310, except:

ATTACHMENT 2

(1) Those involving patents, copyrights, privately developed technical information, or trademarks will be addressed to HQDA (DAJA-PA) WASH DC 20310.

(2) Those involving problems of taxation will be addressed to HQDA (DAJA-PL) WASH DC 20310.

(3) Those involving communication, transportation, or utility service proceedings will be addressed to HQDA (DAJA-RL) WASH DC 20310.

b. Requests and subpoenas forwarded should be accompanied by such of the following data as may be appropriate:

(1) Parties (named or prospective) to the proceeding, their attorneys, and case number, where appropriate;

(2) Party making the request (if a subpoena, indicate moving party) and his attorney;

(3) Name of tribunal in which the proceeding is pending;

(4) Nature of the proceeding;

(5) Date of receipt of request or date and place of service of subpoena;

(6) Name, grade, position, and organization of person receiving request or served with subpoena;

(7) Date, time, and place designated in request or subpoena for production of information or appearance of witness;

(8) Nature of information sought or document requested, and place where document is maintained;

(9) A copy of each document requested. If the document is voluminous, a description may be forwarded in lieu of the copy;

(10) Analysis of the problem with recommendations of the forwarding agency.

7–5. Determination by The Judge Advocate General. The Judge Advocate General, acting personally or through such subordinates as he may designate, will coordinate within Headquarters, Department of the Army, all requests or subpoenas referred to him pursuant to paragraph 7–4. He will determine whether the witness should be permitted to testify or to grant an interview or whether the information should be released. Authority may be granted for release of information or for the appearance of a witness even though the information may be used by or the appearance may be on behalf of a party whose interest is adverse to the interest of the United States.

7–6. Response to subpoena. This paragraph provides policy and procedures for response to subpoenas. Additional guidance is furnished in appendix K.

a. No present or former military member or civilian employee of the Department of the Army shall, in response to the demand of a court order or other authority, produce or disclose any *information exempt from release to the public* contained in the files of the Department of the Army or disclose or produce any *information exempt from release to the public* acquired as a part of the performance of his official duties or because of his official status without the prior approval of the Secretary of the Army.

b. When an official of the Department of the Army to whom a subpoena is referred concludes that a record should not be released or a witness should not appear and testify because such record or testimony would disclose *information exempt from release to the public*, that fact will be reported immediately to The Judge Advocate General as provided in paragraph 6–4. If The Judge Advocate General determines that a record should not be released or an individual should not testify on a particular matter in response to a subpoena, he will advise the person served of the action to be taken (*Touhy v. Ragen*, 340 US 462).

c. If a person served with a subpoena fails to receive authorization or other instructions prior to the time fixed for the production of records or appearance in court, he should communicate with counsel responsible for issuing the subpoena, state that he can produce the desired record or can testify on the matter only if authorized, and request a postponement pending receipt of authorization or ascertain if

ATTACHMENT 2

other releasable information can be substituted. If postponement is refused and other information will not suffice, he should appear in court, submit a copy of this and other applicable regulations, and inform the court that—

(1) Records of the Department of the Army can be produced or that he may appear and testify on the matter only if authorized by the Secretary of the Army or by the person designated by the Secretary to act on his behalf, and

(2) He has requested but has not received authorization or other instructions. He should respectfully request the court or other authority to stay the report or subpoena pending receipt of authority or other instructions.

d. If the court or other authority declines to stay the effect of its demand for *information exempt from release to the public* pending receipt of instructions from the Secretary of the Army, or if the court or other authority rules that the demand must be complied with irrespective of instruction from the Secretary of the Army not to produce or disclose the information sought, the present or former military member or civilian employee upon whom the demand was made shall decline respectfully to comply with the demand.

e. In each instance described above, a judge advocate or civilian attorney of the command concerned should accompany and advise the witness during the court proceedings. Within the United States, the local US Attorney should be consulted.

Section II. RELEASE OF INFORMATION IN CONNECTION WITH LITIGATION

7–7. Scope. This section deals with requests and subpoenas for information to be used in litigation.

7–8. Records of the Army and other agencies. *Preservation.* In order to preserve the integrity of records of the Department of the Army, originals of books, records, papers, or documents will not be furnished to any person or agency for use as evidence in public or private legal proceedings. Properly authenticated copies of Government records may be admitted in evidence in lieu of originals. See 28 USC 1733.

b. Authentication of copies. Copies of Department of the Army records approved for release under this regulation will, when necessary, be authenticated for introduction into evidence by use of a Department of the Army certificate (DA Form 4) prepared in the manner shown in figure 7–1. Negative results of a search are shown in figure 7–2. After the custodian has executed his certificate, the preparing agency will forward the DA Form 4 and a copy of the record to the Headquarters, Department of the Army staff agency indicated below for authentication by the Secretary of the Army:

(1) Records maintained in US Army Engineer Districts and Divisions will be forwarded to the Chief of Engineers, Department of the Army, Washington, DC 20315.

(2) All other records will be forwarded to the official designated in paragraph 11, AR 345–20, as having release authority for that type document.

c. Fees and charges. The schedule of fees and charges for searching, copying, and certifying Army records is set forth in AR 37–30.

d. Documents originated by agencies or organizations outside the Department of the Army (e.g., FBI reports, State traffic accident investigation reports, civilian hospital records) which are included with Army records may be released only with the consent of the originating agency or organization. Normally an individual requesting such records should be advised to direct his inquiry to the originating agency or organization.

7–9. Requests and subpoenas for information releasable to the public. Requests or subpoenas for *information not exempt from release to the public* will be handled as prescribed in AR 345–20.

ATTACHMENT 2

7–10. Requests and subpoenas for information exempt from release to the public. Requests and subpoenas duces tecum for *information exempt from release to the public* and which may not be released under paragraph 7*c*, AR 345–20, will be processed as follows:

a. Subpoenas for defense (classified) information which cannot be declassified will be referred to The Judge Advocate General as provided in paragraph 7–4.

b. Subpoenas for medical or personnel records, not releasable to the public or under paragraph 7*c*, AR 345–20, will be responded to by submitting properly authenticated copies of the records to the court (or to the clerk of the court) where:

(1) The subpoena is accompanied by a court order, or such order is separately served, which orders the person to whom the records pertain to consent to the release of the specific records or orders authenticated copies delivered to the clerk of the court and that order has determined their materiality and the nonavailability of a claim of privilege; or

(2) The clerk of the court is empowered by local statute or practice to receive the records under seal subject to a request that they be withheld from the parties until the court determines the records are material to the issues and until any question of privilege is resolved; or

(3) The custodian is required to appear and authenticate the records, he may appear in court with a copy of the records under seal, state their general content, and surrender them with a request that they remain sealed until the court determines their materiality and privileged nature, if any.

c. Judge advocates and legal officers may furnish to the attorney for the injured party and to the tort feasor's insurance company a copy of the narrative summary of medcial care which relates to a claim under chapter 5. If additional medical records are requested, only those which directly pertain to the pending action will be furnished. If furnishing copies of medical records will be injurious to the injured party's health or prejudice the cause of action, the matter will be reported to HQDA (DAJA–LT) WASH DC 20310.

d. Other requests from the Department of Justice, U.S. Attorneys, States' Attorneys, or attorneys for private litigants will be forwarded to The Judge Advocate General as prescribed in paragraph 7–4.

United States of America

DEPARTMENT OF THE ARMY

El Paso, Texas (PLACE) 1 June 1972 (DATE)

I HEREBY CERTIFY that the document attached hereto is a true and correct copy of the Narrative Summary, Standard Form 502, pertaining to the hospitalization of Jane Doe during the period 3-6 June 1970, an official document in the custody of the Registrar of William Beaumont General Hospital.
(Identify Document) (Office of Custodian)

(Signature of Custodian)
JOHN SMITH
Captain, MSC
Registrar

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of . 19

Secretary of the Army.

By
Administrative Assistant

DA FORM 4 REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

Figure 7–1

ATTACHMENT 2

United States of America

DEPARTMENT OF THE ARMY

Washington, D. C. (PLACE) 1 June 1972 (DATE)

I HEREBY CERTIFY that after diligent search, no General Court-Martial Record of trial pertaining to Private John Doe, SSAN:123-45-6789, could be found in the custody (Identify Document) of the Clerk of Court, U. S. Army Legal Services Agency, Office of The Judge Advocate (Office of Custodian) General.

(Signature of Custodian)

JOHN SMITH
CW4, USA
Clerk of Court

I HEREBY CERTIFY that , who signed the foregoing certificate, is the , and that full faith and credit should be given to his certification.

IN TESTIMONY WHEREOF I, , Secretary of the Army, have hereunto caused the seal of the Department of the Army to be affixed and my name to be subscribed by the Administrative Assistant of the said Department, at the City of Washington, this day of , 19

Secretary of the Army.

By
Administrative Assistant

DA FORM 1 JAN 72 4 REPLACES EDITION OF 1 OCT 47, WHICH WILL BE USED.

Figure 7–3

ATTACHMENT 2

Section III. DEPARTMENT OF THE ARMY PERSONNEL AS WITNESSES IN CIVIL LITIGATION

7–11. Scope. This section deals with interviews and appearances of military personnel and civilian employees of the Army as witnesses in person or by deposition before civil courts and administrative tribunals pursuant to request of counsel or in response to subpoena or other order of court. It is applicable to private litigation as well as to litigation in which the United States has an interest.

7–12. Private litigation. *a.* The appearance of military personnel and civilian employees in private litigation is solely a personal matter between the prospective witness and the requesting party unless—

(1) The testimony involves *information exempt from release to the public*, information obtained in an official capacity, or information relating to Army activities; or

(2) The prospective witness is solicited to testify as an expert; or

(3) The absence of a prospective witness from duty will seriously interfere with the accomplishment of the military mission of the command or organization; or

(4) The appearance involves oversea travel.

b. Requests for interviews with or subpoena for the testimony of military personnel or civilian employees in private litigation will be referred to the individual's commanding officer or supervior. Except in instances involving (1) through (4) above, the commander or supervisor may permit the requested interview or subpoenaed attendance.

c. The decision whether to grant an interview or to testify, as distinguished from the questions of release of information and Army authorization for any necessary absence from duty is a personal matter for the individual. If for personal reasons the military member or civilian employee does not desire to grant the interview or to testify, he will be counseled by the judge advocate or legal adviser on the legal consequences of his refusal.

7–13. Exempt information, Army activities, or official capacity. Where the expected testimony will involve *information exempt from release to the public*, Army activities, or information obtained in an official capacity, the matter will be referred to the judge advocate or legal adviser of the command or agency of the individual whose testimony is requested. The judge advocate or legal adviser will process the question of release of the information sought in accordance with section II. If it is determined that the information may be released, the individual will be permitted to be interviewed or to appear as a witness provided such interview or appearance will not unduly affect the mission of the command or agency. If available, a judge advocate or civilian attorney of the Department of the Army should be present during any interview to act as legal representative of the Army. If a question is propounded which seeks information not previously authorized for release, the legal representative will prohibit the witness from answering and, if necessary to avoid release of the information, terminate the interview. Before terminating the interview, however, every effort should be made to substitute releasable information and to continue the interview as to other subjects. A report of the matter will then be forwarded to The Judge Advocate General as outlined in paragraph 7–4. Any written statement furnished by the military member or civilian employee will be prepared under the supervision of the legal representative.

7–14. Expert witnesses. *a.* The Department of the Army maintains a strict impartiality in private litigation and conflicts of interest are to be avoided (AR 600–50). Military personnel and civilian employees may not appear as expert witnesses in private litigation or in litigation in which the United States has an interest for a party other than the United States without the prior approval of Headquarters, Department of the Army. These requests will be forwarded to The Judge Advocate General in accordance with paragraph 7–4.

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b. This limitation does not apply to members of the Army Medical Department or other qualified specialists when—

(1) They testify in private litigation involving patients they have treated, investigations they have made, laboratory tests they have conducted, or action they have taken, and they limit their testimony to factual matters such as their observations of the patient, or other operative facts, the treatment prescribed or corrective action taken, course of recovery or steps required for repair of damage suffered, and contemplated future treatment or utility of item damaged. Their testimony may not extend to hypothetical questions or to a prognosis.

(2) Requests are for expert witnesses on behalf of the United States in cases involving medical care recovery claims under section II, chapter 5.

c. Requests for expert witnesses from US Attorneys or attorneys representing the interests of the United States will be met or referred to HQDA (DAJA–LT) WASH DC 20310.

7–15. **Litigation in which the United States has an interest.** a. Requests for interviews with or subpoenas for testimony of military personnel or civilian employees in litigation in which the United States has an interest will be referred to the judge advocate or legal adviser of the command or agency of the individual whose testimony is requested. Except as set out in *b* below and paragraph 7–14*c*, the judge advocate or legal adviser will forward the request or subpoena to The Judge Advocate General in accordance with paragraph 7–4. This forwarding requirement includes requests received from the Department of Justice. As each request or subpoena involves a question of release of information, the judge advocate or legal adviser will insure that this aspect of the request or subpoena is also presented in the reference to The Judge Advocate General. Interviews or appearances may be authorized even though the information may be used in litigation by parties whose interests are adverse to those of the United States.

b. The judge advocate or legal adviser may authorize the appearance of witnesses requested by U.S. Attorneys or by attorneys representing the interests of the United States (e.g., attorney handling the Government's medical care claim under section II, chapter 5) provided—

(1) The request or subpoena does not require travel by the witness outside the judicial district (unless the distance to be traveled is less than 100 miles) or oversea theater in which the witness is stationed, assigned, or employed (see para 7–18*a*(2) and 7–19).

(2) The testimony of the witness does not involve *information exempt from release to the public.*

(3) The testimony, if the witness is a member of the Army Medical Department, will not be injurious to the health of the patient concerned.

c. When requested by a US Attorney, the judge advocate or legal adviser will insure that military or civilian employee witnesses are not reassigned or otherwise removed from the judicial district without first advising the US Attorney. If a witness is vital to the Government's case, informal arrangements should be made to retain the witness in the command until trial. If this is not feasible or if satisfactory arrangements cannot be made with the US Attorney, the matter will be reported to HQDA (DAJA–LT) WASH DC 20310.

7–16. **Oversea witnesses.** Request or subpoena for a witness stationed outside the continental limits of the United States, including Alaska and Hawaii, to appear before a tribunal within the continental limits of the United States will be referred to the judge advocate or legal adviser of the command or agency of the individual whose testimony is requested. The judge advocate or legal adviser will forward the request or subpoena to The Judge Advocate General as provided in paragraph 7–4. See 28 USC 1783 on the subpoena of a person in a foreign country.

7–17. **Depositions.** a. *Policy.* The use of a deposition rather than the personal appearance of a witness is encouraged when this will minimize

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interference with the performance of the Army's mission.

b. General. Depositions or other evidentiary statements taken from military personnel or civilian employees for use in state or Federal courts are governed by the rules of the court having jurisdiction of the matter. Depositions or other evidentiary statements for use before foreign tribunals are governed, generally, by the law of the foreign state in which the depositions are to be used and the provisions of applicable treaties and agreements. (See 28 USC 1781 as to the use of letters rogatory.) Military personnel and civilian employees abroad who receive requests or notices for the taking of a deposition or other evidentiary statements shall advise the appropriate judge advocate or legal adviser of this fact immediately.

c. Procedure. A request or notice for the taking of a deposition from a party to private litigation will be referred to the witness' commanding officer or supervisor unless the expected testimony concerns Army activities, *information exempt from release to the public*, or information obtained in the performance of official duties or there is a request that the deposition be taken by an officer. All other requests or notices will be referred to the judge advocate or legal adviser for the command.

(1) If the United States has an interest in the litigation the judge advocate or legal adviser will refer the matter to The Judge Advocate General.

(2) If the expected testimony in cases of private litigation involves Army activities, *information exempt from release to the public*, or information obtained in the course of official duties, the judge advocate or legal adviser will process the question of release of information as provided in section II. If it is determined that the information may be released, the judge advocate or legal adviser will authorize the taking of the deposition provided it will not affect unduly the military mission of the command or agency. A judge advocate or civilian attorney of the Department of the Army should be present during the taking of the deposition and should take action as prescribed in paragraph 7–13 when necessary.

(3) If a request or notice for the taking of a deposition includes a request that the deposition be taken before an officer, the judge advocate or legal adviser may authorize the use of a Reserve officer. Regular Army officers should not be utilized. See 10 USC 3544(b); Rule 28 FRCP, Title 28 App USC.

d. Appearance as counsel. A request to use a military member or civilian employee as counsel for one of the parties to the taking of a deposition will be referred to the judge advocate or legal adviser for appropriate action. See paragraph 1–4.

e. Expert witnesses. The provisions of paragraph 7–14 concerning expert witnesses are applicable to testimony by deposition.

7–18. Status, travel, and expenses of witnesses.

a. Witnesses for the United States.

(1) *Status of witness.* A military member authorized to appear as a witness for the United States will be placed on temporary duty. The status of a civilian employee will be determined in accordance with Federal Personnel Manual 630.10–3 (hereinafter called FPM). Military personnel and civilian employees who appear as necessary witnesses for a party asserting the Government's claim under chapter 5, for medical care are witnesses for the United States within the meaning of this paragraph provided the Government's claim is large enough to justify the expenditure.

(2) *Travel arrangements.* Travel arrangements for witnesses for the United States normally are made by the Department of Justice through The Judge Advocate General for other than local travel. Instructions for this travel, including fund citation, will be issued to the appropriate commander by Headquarters, Department of the Army. A US Attorney, or an attorney asserting the Government's medical care claim under chapter 5 may make arrangements for local travel through the judge advocate or legal adviser for attendance of a witness who is stationed at an installation within the same judicial district, or not more than 100 miles from the place of testifying. Other requests will be referred to The Judge Advocate

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General in accordance with paragraph 7–4. The instructions from Headquarters, Department of the Army, or the request from the US Attorney or the attorney asserting the Government's claim, will serve as a basis for the issuance of appropriate travel orders by the local commander.

(3) *Travel and per diem expenses.* The witness' commander or supervisor should insure that the witness has sufficient funds to defray his expenses. The command judge advocate or legal officer will provide assistance as required.

(a) Where local travel is performed at the request of a US Attorney and the case does not involve an activity of the Army, the Government transportation request should be issued to the witness through the US Attorney making the request or by the US Marshal and per diem paid by the US Marshal. (Title 8, United States Attorneys Manual, pp 120–121.)

(b) The attorney asserting the Government's medical care claim under chapter 5 may be required to advance local travel expense money to the witness requested and to include these in recoverable costs where the Government's claim is not large enough to justify expenditures of Government travel funds.

(c) Other local travel and per diem expense for cases involving Army activities or claims is a proper expense of the command issuing the orders.

(d) Headquarters, Department of the Army, will furnish travel expense and per diem funds for other than local travel and will receive reimbursement from the Department of Justice or other Government agency as appropriate.

b. Witnesses for the District of Columbia.

(1) *Status of witness.* A military member authorized to appear as a witness for the District of Columbia will attend in a regular duty status. The status of a civilian employee will be determined in accordance with FPM 630.10–3.

(2) *Travel arrangements.* Travel arrangements will be made by the requesting agency direct with the witness or his commanding officer. Appropriate orders will be issued by the local commander when necessary.

(3) *Travel expenses.* The District of Columbia and the person sought as a witness will be informed that all arrangements for payment of travel and subsistence expenses, other than such monetary allowances for subsistence as may be normally furnished to enlisted personnel pursuant to Department of Defense Pay and Allowances Entitlements Manual (DODPM), chapter 1, will be made directly between the District of Columbia official and the prospective witness. An overseas commander may in his discretion, operations of the Department of the Army permitting, authorize the prospective witness to use, in travel outside the United States, military transport or military aircraft on a space-available basis without cost to the District of Columbia.

c. Witnesses for a State or private litigant.

(1) *Status of witness.* If authorized to appear as a witness for a State or private litigant, and the testimony to be given relates to information obtained in the performance of his regular, official duties, a military member may attend in a duty status. If authorized to appear as a witness but his testimony does not relate to information obtained in the performance of his regular, official duties, a military member may be granted a pass or administrative absence where appropriate under AR 630–5,or be required to take ordinary leave to attend. However, military members appearing as expert witnesses on behalf of a state or private litigant will be required to take ordinary leave. The status of a civilian employee will be determined in accordance with FPM 630.10–3. See a(1) above for status of witnesses in cases of medical care recovery claims under section II, chapter 5.

(2) *Travel arrangements.* Travel arrangements for attendance of military or civilian personnel authorized to appear as witnesses for a State or private litigant normally will be made by the requesting party with the individual concerned. Appropriate orders will be issued by the local commander when necessary.

(3) *Travel expenses.* Travel and subsistence expenses of the witness, other than such monetary allowances for subsistence as may normally be furnished to enlisted personnel

ATTACHMENT 2

pursuant to Department of Defense Pay and Allowances Entitlements Manual (DODPM), chapter 1, may not be paid by the United States. They are solely a matter between the witness and the party seeking his appearance. Witnesses ordinarily should be advised to require advance payment of such expenses. Military personnel authorized to appear in a pass, duty, or administrative absence status are not entitled to receive witness attendance fees, but may accept travel and subsistence expense money from the requesting litigant. All witness fees tendered the military member will be remitted to the Treasurer of the United States. A civilian employee authorized to appear in his official capacity will accept the authorized witness fees, in addition to the allowance for travel and subsistence, and make disposition of the witness fees as instructed by his personnel office (FPM 630.10–3*g*).

(4) *Space available travel.* Space available transportation may be utilized to the continental United States port of debarkation as authorized by paragraph 4–4, DOD 4515.13–R.

7–19. Witnesses before foreign tribunals. *a.* Requests or subpoenas from a foreign government or tribunal for military personnel and civilian employees stationed or employed within that country to be interviewed or to appear as a witness will be forwarded to the staff judge advocate of the command exercising general courts-martial jurisdiction over the unit to which the individual is assigned, attached, or employed. The staff judge advocate will determine whether—

(1) A consideration listed in paragraph 7–12 applies.

(2) The information requested is releasable under the criteria of section II.

(3) The approval of the American Embassy should be obtained because the person is attached to the Embassy staff or a question of diplomatic immunity otherwise may be involved.

b. If the judge advocate determines that the United States has an interest in the litigation (see para 7–2*c*), the commander may authorize the interview or order the individual's attendance in a temporary duty status with full entitlement to travel and per diem allowances. The United States will be presumed to have an interest in the litigation if it is bound by treaty or other international agreement to insure the attendance of such personnel.

c. If the judge advocate determines that the United States does not have an interest in the litigation, the commander may authorize the interview or the appearance of the witness in accordance with paragraphs 7–12*b* and 7–13*c*.

d. If the requested witness is stationed in the United States, the matter will be referred to The Judge Advocate General in accordance with paragraph 7–4. See 28 USC 1782.

DANIEL P. SCHRAGE

Professor, School of Aerospace Engineering at Georgia Tech, Atlanta, Georgia. January 1984 to Present: One of three universities set up as Centers of Excellence in Rotary Wing Technology.

July 1974 to January 1, 1984: Employed by U. S. Army. Major until 1978, civilian employee from 1978-1984. With the Army Aviation Systems Command, which procures U. S. Army aviation products, including helicopters.

1967 to 1974: Officer in U. S. Army. Rank: Second Lieutenant to Major.

Graduate of West Point 1967, General Engineering. Masters of Science, Georgia Tech 1974. Masters of Business Administration, Webster University, St. Louis, Missouri 1975. Doctor of Science, in Mechanical Engineering, Washington University, St..Louis, Missouri 1978.

Crawford Named '89 Nikolsky Lecturer

Charles Crawford, left, with John Zugschwert, accepting his Secretary of Defense Medal of Honor for Meritorious Civilian Service.

The AHS announced in February that Charles C. Crawford has been selected to deliver the 1989 Nikolsky Lecture at the 45th Annual Forum and Technology Display in Boston, May 22-24, 1989. Crawford will discuss "Rotorcraft Analytical Improvements Needed to Reduce Developmental Risk."

Crawford is currently the head of the Georgia Institute of Technology Research Institute's Aviation Technology Branch. He retired as Technical Director and Director of Research, Development, and Engineering for the U.S. Army Aviation Systems Command in 1988. Crawford was presented the Secretary of Defense Medal of Honor for Meritorious Civilian Service for his accomplishments during his 33 years in the government.

An AHS member since 1960, Crawford is on the Society's Board of Directors. He has served as President and Chairman of both the AHS and the Vertical Flight Foundation.

The Nikolsky Lectureship is given to an individual who reflects the highest ideals, goals, and achievements in the field of helicopter and V/STOL aircraft engineering and development. The selection of the lecturer is based on the individual's distinguished career, and his or her ability to compose an archival lecture document.

ATTACHMENT 3

[illegible]
ATTORNEYS AT LAW
303 FORT WORTH CLUB BUILDING
306 WEST 7th STREET
FORT WORTH, TEXAS 76102-4988
(817) 333-1391 METRO (817) 429-0861
TELECOPIER (817) 870-2427

OF COUNSEL
[illegible]

March 16, 1989

Mr. Robert Garfield
Chief, General Law Division
AVSCOM Legal Office, AMSAV-JR
4300 Goodfellow Blvd.
St. Louis, MO 63120-1798

Re: Cause No. 68,282-C; Beavers v. Bell Helicopter Textron Inc.

Dear Mr. Garfield:

Pursuant to the regulations of the Department of Defense, I am requesting authorization for Dan Schrage to testify by deposition and at trial in the above-styled case.

This case arises out of an accident which occurred on February 15, 1985 involving a JAH-1S helicopter at Fort Rucker, Alabama. The accident investigation determined that the cause of the accident was the failure of the swashplate bearing due to increased thrust loads. Thereafter, there was a message from AVSCOM requesting the examination of all swashplate bearings on the AH-1S. Procedures for overhaul, inspection, and maintenance of the swashplate assembly, I am told, were subsequently changed.

Bell Helicopter has been sued, along with Northrop Worldwide Aviation Systems, in the above-styled case in the state court in Amarillo, Texas. The Plaintiffs have thus far claimed a design defect in the swashplate assembly, but have not been specific in their claims.

The United States is not a party, and I know of no claim any person intends to assert in this case against the United States government.

Dan Schrage has agreed to assist Bell as an expert witness in the defense of this case. He was not involved in the accident investigation, and I am not aware that he has any confidential information related to the accident investigation.

Mr. Schrage would be asked to testify concerning the historical development and participation of AVSCOM in the design and

ATTACHMENT 4

manufacturer of the AH-1 helicopter from its AH-1G configuration in the mid-to-late '60's to its AH-1S configuration with Kaman blades in the 1980's. In this respect, Mr. Schrage's knowledge would be relevant to the issue of the military contractor defense, showing the knowledge of the military of the components used on the AH-1 helicopter.

Mr. Schrage would also be asked to testify based upon independent expertise concerning the suitability of the AH-1S swashplate assembly in its present configuration for use on the AH-1 helicopter with Kaman blades. He has not yet done this analysis, but we have asked him to assist us.

I would appreciate your prompt attention to this request. THIS IS A VERY OLD CASE. IT COULD BE SET FOR TRIAL ANYTIME. WE NEED YOUR RESPONSE AS SOON AS POSSIBLE.

I look forward to your response. If you need any further information, do not hesitate to call me.

Very truly yours,

R. David Broiles

RDB:smb

cc: Mr. Dan Schrage

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\drive2\usr\sylvia\beavers

ATTACHMENT 4

BI .VN, HER; 1AN, SC. . T, DEAN & MILL
ATTORNEYS AT LAW
FORT WORTH, TEXAS 76102

March 16, 1989

Mr. Robert Garfield
Chief, General Law Division
AVSCOM Legal Office, AMSAV-JR
4300 Goodfellow Blvd.
St. Louis, MO 63120-1798

Re: Cause No. 68,282-C; Beavers v. Bell Helicopter Textron Inc.

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Pursuant to the regulations of the Department of Defense, I am requesting authorization for Charles C. Crawford to testify by deposition and at trial in the above-styled case.

This case arises out of an accident which occurred on February 15, 1985 involving a JAH-1S helicopter at Fort Rucker, Alabama. The accident investigation determined that the cause of the accident was the failure of the swashplate bearing due to increased thrust loads. Thereafter, there was a message from AVSCOM requesting the examination of all swashplate bearings on the AH-1S. Procedures for overhaul, inspection, and maintenance of the swashplate assembly, I am told, were subsequently changed.

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The United States is not a party, and I know of no claim any person intends to assert in this case against the United States government.

Charles C. Crawford has agreed to assist Bell as an expert witness in the defense of this case. He was not involved in the accident investigation, and I am not aware that he has any confidential information related to the accident investigation. He is familiar with the subsequent activities of AVSCOM, which are public information, and which have been provided to me through document production by AVSCOM.

ATTACHMENT 5

Mr. Crawford would be asked to testify concerning the historical development and participation of AVSCOM in the design and manufacturer of the AH-1 helicopter from its AH-1G configuration in the mid-to-late '60's to its AH-1S configuration with Kaman blades in the 1980's. In this respect, Mr. Crawford's knowledge would be relevant to the issue of the military contractor defense, showing the knowledge of the military of the components used on the AH-1 helicopter.

Mr. Crawford would also be asked to testify based upon independent expertise concerning the suitability of the AH-1S swashplate assembly in its present configuration for use on the AH-1 helicopter with Kaman blades. He has not yet done this analysis, but we have asked him to assist us.

I would appreciate your prompt attention to this request. THIS IS A VERY OLD CASE. IT COULD BE SET FOR TRIAL ANYTIME. WE NEED YOUR RESPONSE AS SOON AS POSSIBLE.

I look forward to your response. If you need any further information, do not hesitate to call me.

Very truly yours,

R. David Broiles

RDB:smb

cc: Mr. Charles C. Crawford

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ATTACHMENT 5

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

March 30, 1989

Litigation Division
General Litigation Branch

R. David Broiles, Esquire
Brown, Herman, Scott, Dean & Miles
203 Fort Worth Club Building
306 West Seventh Street
Fort Worth, Texas 76102-4988

Dear Mr. Broiles:

This letter responds to your written request to depose and for the possible testimony of Messrs. Dan Schrage and Charles C. Crawford as expert witnesses in the case of Beavers v. Bell Helicopter Textron, Inc. For reasons expressed below, your request is denied.

Both present and former Department of the Army personnel and civilian employees are allowed to appear as expert witnesses in private litigation only under the most extraordinary circumstances. There are a number of compelling reasons for exercising strict control over such witness appearances.

The policy of the Army is one of strict impartiality in litigation in which the Army is not a named party, a real party in interest, or in which the Army does not have significant interest. When a witness with an official connection with the Army testifies, there is a natural tendency to assume that the testimony represents the official views of the Army, even where there are express disclaimers to the contrary.

The Army is also interested in preventing the unnecessary loss of the services of its personnel in connection with matters unrelated to their official responsibilities. When Army personnel testify as expert witnesses in such unrelated litigation, their official duty performance is invariably disrupted, often at the expense of the Army's mission accomplishment and the federal taxpayer.

ATTACHMENT 6

Finally, the Army is concerned about the potential for conflict of interest inherent in the unrestricted appearance of its personnel as expert witnesses on behalf of parties other than the United States. Even the appearance of such conflicts of interest seriously undermines the public trust in the integrity of our Government.

In this case, the extraordinary circumstances required for an exception to Army policy are not met. Accordingly, your request is denied.

If you have any questions, please call me at (202) 697-3462.

Sincerely,

John P. Galligan
Lieutenant Colonel, U.S. Army
Chief, General Litigation
Branch

Copy Furnished:

Commander
U.S. Aviation Systems Command
ATTN: AMSAV-JR (CPT Jakubowski)
4300 Goodfellow Boulevard
St. Louis, Missouri 63120-1798

ATTACHMENT 6

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OF COUNSEL
ARDELL M. YOUNG
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JESSE M. BROWN (1893-1979)
A. W. HERMAN (1905-1967)
JOHN M. SCOTT (1911-1985)
WILLIAM M. BROWN (1912-1987)

June 13, 1989

COPY

John P. Galligan
Lieutenant Colonel, U. S. Army
Chief, General Litigation Branch
Department of the Army
Office of the Judge Advocate General
Washington, D.C. 20310-2200

Re: Beavers v. Bell Helicopter Textron Inc., et al--Testimony of Charles C. Crawford and Daniel Schrage

Dear Lt. Colonel Galligan:

Attached find two letters from me dated March 16, 1989 to the AVSCOM Legal Office, requesting permission for the testimony of Charles C. Crawford and Daniel Schrage. Also attached find your response of March 30, 1989.

Please consider this a renewed request for the testimony of Charles Crawford and Dan Schrage. However, I will change my request made March 16, 1989 to eliminate the request that they be able to testify based upon their independent expertise, or any calculations or investigations they would make, concerning the cause of this accident.

Basically, Mr. Crawford and Mr. Schrage have personal knowledge from their employment at AVSCOM of the selection, testing, qualification, and installation of the Kaman 747 rotor blades on the AH-1 helicopters. They also have historical knowledge of the development of the AH-1 helicopter. Their testimony is relevant to the issue of the military contractor defense.

We would offer their testimony to show that they (1) had knowledge of the specifications for the AH-1 helicopter, (2) were involved in approving those specifications, and (3) knew of any dangers associated with the design of those specifications relevant to the issues in this lawsuit.

Secondly, we would offer evidence that they knew of the selection of the Kaman blades; they knew that it increased loads on flight control components; and that the Army approved that blade for the AH-1 helicopter.

ATTACHMENT 7

Both men are experts. Their opinions, formed during the course of their employment with the military are relevant to the decisions made by the United States Army in the procurement of equipment related to this lawsuit. We request this testimony in order to be able to establish the military contractor defense.

If you have any further questions about the purpose of this testimony, I would appreciate it if you would call me. I again request that these two gentlemen be allowed to testify in this case. We will pay them their regular fee for consultation purposes. However, we will not request that they make any additional investigation as expert witnesses on our behalf.

Very truly yours,

R. David Broiles

RDB:smb
Attachments

cc: Mr. Charles C. Crawford
Mr. Daniel Schrage

ltr-army d4
\drive2\usr\sylvia\beavers

ATTACHMENT 7

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

June 20, 1989

REPLY TO
ATTENTION OF

Litigation Division
General Litigation Branch

R. David Broiles, Esquire
Brown, Herman, Scott, Dean & Miles
306 West Seventh Street
Fort Worth, Texas 76102-4988

Dear Mr. Broiles:

This responds to your renewed written request of June 13, 1989, to depose Messrs. Charles C. Crawford and Dan Schrage in the case of Beavers v. Bell Helicopter Textron, Inc., et al. We have considered the arguments contained in your recent correspondence; however, we adhere to the reasons enunciated in our earlier letter on this subject. Accordingly, your request is denied.

If you have any questions, please call me at (202) 697-3462.

Sincerely,

John P. Galligan
Lieutenant Colonel, U.S. Army
Chief, General Litigation
Branch

Copy Furnished:

Commander
U.S. Army Aviation Systems Command
ATTN: AMSAV-JR (CPT Jakubowski)
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ATTACHMENT 8

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August 30, 1989

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Michael Hoenig, Esq.
Counsel for The Product Liability Advisory Council, Inc.
Herzfeld & Rubin, P.C.
40 Wall Street
New York, New York 10005

Re: Trevino v. General Dynamics

Gentlemen:

Pursuant to Supreme Court Rule 36.1, defendant/petitioner General Dynamics Corporation consents to your filing on behalf of your respective clients, a brief of amicus curiae in support of its Petition for Writ of Certiorari.

Herbert L. Fenster

Herbert L. Fenster, Esq.
Counsel for Petitioner General Dynamics Corporation
McKenna, Conner & Cuneo
1575 Eye Street, N.W.
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HLF/mpk

ATTACHMENT 9

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September 15, 1989

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Counsel for The Product Liability
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40 Wall Street
New York, New York 10005

Re: Trevino v. General Dynamics

Gentlemen:

Pursuant to Supreme Court Rule 36.1, plaintiffs/respondents Gloria Trevino, et al., consent to your filing on behalf of your respective clients a brief of amicus curiae in support of defendant/petitioner General Dynamics Corporation's

ATTACHMENT 10

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

David W. Holman

David W. Holman
Counsel for Respondent
Gloria Trevino, et al.
Fisher, Gallagher, Perrin & Lewis
70th Floor
First Interstate Bank Plaza
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DWH/jwd
WPLTRS

ATTACHMENT 10